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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 518

THE ATLANTIC REFINING COMPANY,
CITIES SERVICE PRODUCTION COMPANY,
CONTINENTAL OIL COMPANY,
TIDEWATER OIL COMPANY,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
LONG ISLAND LIGHTING COMPANY, and
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondents.

No. 536

TENNESSEE GAS TRANSMISSION COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
LONG ISLAND LIGHTING COMPANY, and
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

The Public Service Commission of the State of New York does not oppose the grant of *certiorari* in this case.

We believe that the Court of Appeals for the Third Circuit correctly determined that the Federal Power Com-

mission acted improperly in granting unlimited, unconditional certificates of public convenience and necessity to the petitioners herein.

The Commission had on two occasions correctly found that the record before it contained insufficient evidence to support a determination that public convenience and necessity required certification of the proposed sales upon the terms sought by the petitioners—viz., at the unprecedentedly high price of 22.4¢ per Mcf. That evidentiary deficiency was never supplied. In that situation, under the statute (Natural Gas Act, Section 7), the Commission had two alternatives: (1) to issue certificates to the extent authorized by the proof—i.e., limited thereto or conditioned upon modification of the sales contracts to accord therewith—as the Act authorizes, or (2) to deny the applications, as the Act commands.

The record proof demonstrated the propriety of certification of the proposed sales at an initial price no higher than 17¢ per Mcf, the highest price being paid in the area by the pipeline purchaser (Tennessee) pursuant to previous FPC certifications. The justness and reasonableness of that price was already the subject of proceedings under Sections 4 or 5 of the Act, then pending against most of the petitioner-producers and involving similar interstate sales in the Louisiana production area. The scope of those proceedings could readily have been expanded to include the instant sales. Such 17¢ certificates would have maintained the status quo in the area respecting the general price level. Pending determination of the rate proceedings the pipeline purchaser—and through it, the consumer—would not have been subjected to wholly unjustified price burdens. Thus, pursuit of alternative course of action (1) was reasonably called for under the circumstances, rather than the more drastic course (2).

However, the Commission in its final determination here pursued neither. Instead, prompted solely by voluble but quite unrealistic threats by the producer-applicants to withhold their huge quantities of gas from the interstate market unless certificates were granted to them conforming precisely to their applications and unconditionally approving the initial price they specified, the Commission elected to dispense with the necessity for any demonstration of the propriety of that price. Thereby, the Commission dispensed with the necessity for proof pertaining to the "prime determinant" of any producer certificate application under Section 7—the fundamental aspect of the applicant's burden to establish public convenience and necessity for consummation of the proposed interstate sale. In other words, the Commission abjectly surrendered to the applicants' demands. In this, we respectfully submit the Commission was in error, no matter how denominated. We contended below that the Commission action was contrary to law and, under the circumstances, abusive of its discretion, arbitrary and capricious. The Court below thought it even worse and denominated it as in excess of the Commission's statutory jurisdiction. The appellation is immaterial. The point is, the Commission's action was contrary to law.

Therefore, this respondent urges that certiorari be denied in so far as the petitions request review of the propriety of the Circuit Court's denomination, or description of the legal effect, of the Commission's action. (Question Presented 4 in No. 518 and Question Presented 3 in No. 536.) That claimed error was predominantly relied upon by petitioners in their applications for rehearing in the Court below. Their applications were denied. It constitutes the major thrust of their petitions here. There is no dispute whatever as to the law on that issue. The Court below, by its denial of rehearing, correctly held that it had

not transgressed the statutory prohibition against resolution of issues not raised below. There is no conflict, on that issue, among the circuits or with the decision in any other proceeding presently before this Court. It is entirely subordinate and tangential to the major questions presented by the instant petitions, and of insufficient independent importance to merit review by this Court.

However, we agree that this case presents basic issues respecting the prerogatives and duties of the Federal Power Commission in the disposition of Section 7 applications. Since the *Signal* case* the Commission has been rent with discord respecting the proper and lawful exercise of its prerogative to issue limited certificates or certificates containing initial price reduction conditions. In addition, the Courts of Appeal are not in complete accord in their approach to the problem as is indicated by comparison of the decision below with that in *Oklahoma Natural Gas Company* v. *Federal Power Commission*, 257 F. 2d 634, certiorari granted November 10, 1958 (No. 288, Oct. Term, 1958). Meanwhile, in the absence of any restraint by the Commission or insistence by it upon demonstration of justification for boosting the prevailing price level in a given production area, initial producer prices have run rampant. In the area here involved, for instance, they have leaped progressively from 9¢ per Mcf to 17¢ per Mcf to the instant 22.4¢ per Mcf in less than four years. And in the current unrestrained sellers market and under the current Commission policy of unconditional surrender to producer price demands, the sky is the limit. See *Re Texaco Seaboard, Inc.*, 20 F. P. C. ....., Opinion 315, issued September 4, 1958. Accordingly, because of

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* *Re Cities Service Gas Company*, 14 F. P. C. . , 12 PUR 3d 3, reh. den. 15 F. P. C. 1020, aff'd, *sub nom Signal Oil and Gas Company* v. *Federal Power Commission*, 238 F. 2d 771 (C. A. 3, 1956), cert. den. 353 U. S. 923 (1957).

the vital importance of the basic issues involved, the frequency with which they have arisen and with which they will continue to arise, we believe that the discord within the Commission upon the basic fundamentals of a Section 7 proceeding should be resolved by this Court. *Oklahoma Natural Gas Company* v. *Federal Power Commission, supra,* does not present that basic divergence.

For these reasons and without conceding in any degree the validity of any of the arguments advanced by petitioners in their quest for certiorari herein, the Public Service Commission of the State of New York believes that this case should be reviewed by this Court concurrently with *Oklahoma Natural Gas Company* v. *Federal Power Commission* (No. 288). To permit thereof we urge favorable disposition of the instant petitions, to the extent herein indicated.

Respectfully submitted,

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